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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-332

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY, PASSAIC COUNTY COURT, LAW DIVISION, and JOSEPH D. J. GOURLEY, Passaic County Prosecutor,

Petitioners,

vs.

UNITED STATES OF AMERICA,
ex rel. JOSEPH RUSSO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY, PASSAIC COUNTY COURT, LAW DIVISION, and JOSEPH D. J. GOURLEY, Passaic County Prosecutor,

Petitioners,

vs.

UNITED STATES OF AMERICA,
ex rel. JOSEPH RUSSO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ a certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 24, 1973, reversing the judgment of the United States District Court for the District of New Jersey and remanding the cause to the District Court for it to grant the petition for Writ of Habeas Corpus filed by Respondent.

Opinions Below

The opinion of the United States Court of Appeals for the Third District, finding there to have been no mani-

fest necessity for the declaration of the mistrial and thereby holding that reprosecution would be barred, is reproduced in Appendix A hereto (1a et seq.). The decision of the United States District Court which held that the trial judge had acted properly in exercising his discretion to conclude the trial at the point he did, is contained in the Appendix of Respondent (then Petitioner-Appellant) Russo, filed with the Court of Appeals, and is also reproduced in the Appendix hereto. The oral decision of the trial court, denying a motion for dismissal of the indictments against Respondent, is contained in the Appendix of Petitioner (then Appellee), filed with the Court of Appeals.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 24, 1973. This petition for writ of certiorari was filed within thirty days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the Court of Appeals apply the wrong standard of appellate review, forsaking the established standard of determining whether there was an abuse of discretion and instead base its ruling on its own feeling of what the proper procedure should have been?
2. Does the record of the state court proceedings justify the finding of the Court of Appeals that there was no "manifest necessity" for the declaration of the mistrial by the state trial judge?

Constitutional Provisions Involved

This matter involves the following portion of the Fifth Amendment to the United States Constitution:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . .

and the Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Statement of the Case

1. Basis for Federal Jurisdiction.

The petition for writ of habeas corpus filed by Joseph Russo in the United States District Court for the District of New Jersey on July 31, 1972, asserted that he was being held in custody and restrained of his liberty, while on conditional bail pending retrial of two indictments charging him with murder, said custody and restraint being unlawful, in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

The United States District Court found that petitioner (Russo) had exhausted his State remedies within the meaning of 28 U.S.C. § 2254(b) and (c), and that the decision before the Court hinged solely upon the actions of the trial judge in declaring the mistrial.

The Court of Appeals held that Appellant (Russo) had exhausted his state remedies, having raised his double

jeopardy claim to the state courts, and while released on bail, was "in custody" within the meaning of 28 U.S.C. §§ 2241(c)(3), 2254(a) so as to confer jurisdiction on the Court.

2. History of the Proceedings.

By Indictment Nos. 1031-71 and 1032-72, returned by the Passaic County Grand Jury, Respondent Joseph Russo was charged with the murders of Charles Sheppard and Shirley Green on or about January 1, 1971, said murders occuring at a New Year's Eve party at the respondent's home. Trial was commenced before the Honorable Louis Schwartz, Judge of the District Court, temporarily assigned, and a jury on December 3, 1971. Trial was terminated with a declaration of a mistrial on December 18, 1971, following the inability of the jury to arrive at a verdict.

Respondent moved for a dismissal of the indictments against him, which motion was denied by the trial court (Transcript of Hearing contained in Petitioner's (Appellee's) Appendix filed with the Court of Appeals). Leave to file an interlocutory appeal was denied by the Appellate Division of the Superior Court of New Jersey and the New Jersey Supreme Court declined certification of the matter. Respondent then filed his Writ of Habeas Corpus (Following the denial of certification, and prior to the filing of the writ, respondent was retried on the indictments but the trial terminated with a mistrial, not the subject of the present matter). Hearings were held on the application for the writ before the Honorable Clarkson S. Fisher, U.S.D.J., on August 9 and September 5, 1972 (Transcripts contained in Respondent's (Appellant's) Brief filed in the Court of Appeals) and the

decision of the District Court denying the application for the writ and certifying probable cause was rendered on September 6, 1972. Final Order and Certification was entered on October 10, 1972.

Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on November 11, 1972. Following a hearing on April 30, 1973 the opinion of the Court of Appeals, reversing the judgment of the District Court was filed on July 24, 1973.

3. Factual Background.

The trial of Respondent Joseph Russo was commenced on December 3, 1971. It was the State's contention, as presented through its principal witness, Kenneth Timmerman, that Russo had murdered Charles Sheppard and Shirley Green, firing a number of bullets into each of the victims. The defense countered, through the testimony of William Gutowski, that Timmerman was the one who had killed the decedents. Following nine days of testimony, the case was submitted to the jury at 10:35 A.M. on December 17, 1971. After several hours of deliberation, the trial judge (Hon. Louis Schwartz, J.D.C. t/a) indicated he would recall the jury to instruct them on the effort to deliberate for the purposes of reaching a verdict. Counsel for defendant expressed objection to an instruction, stating his opinion it was not out of the ordinary for the jury to deliberate five or six hours after this type of trial. The court noted the problem with regard to arranging overnight accommodations, but indicated that due to objection he would defer speaking to the jurors until after they had eaten dinner. Counsel noted his prior objection to having the jury accommodated overnight (Appendix to Petitioner-Appellant Russo's Brief

filed in the Court of Appeals, hereinafter referred to as Brief Appendix, 5a-1 to 7a-14). Defense counsel then expressed his opinion that if the jury could not agree on a verdict after the day's deliberation, "they should be discharged and not brought in overnight." (Brief Appendix 7a-17 to 19).

At 7:05 P.M., the court called the jury out and gave them a supplemental instruction regarding the duty to agree on a verdict if possible, ordering them to continue to deliberate. The jury retired to the juryroom at 7:10 P.M., and defense counsel noted his exception to the charge (Brief Appendix, 8a-20 to 11a-9). The jurors were recalled to the courtroom at 8:20 P.M. at which time the trial judge apologized for having "to require you to remain in a small juryroom for all of these hours," commented that "I know you may be reaching the time where you may start to be tiring", and due to the circumstances "and since you may be tiring" asked the jurors to retire to determine among themselves whether they could reach a unanimous verdict at this time, and so advise the court. Upon the return of the jurors to the juryroom at 8:25 P.M., defense counsel expressed his opinion that the court was perhaps putting undue pressure on the jury to reach a verdict. The judge answered,

> "My concern here is that the jury should be able to render a verdict while they are alert and I have some concern that as the hours pass that sometimes people tire. They may not tire, they may have enough enthusiasm for their work that they could go on for hours, but these are responsibilities that I feel that the Court has to weigh. What I am suggesting here is what I feel is necessary in the interest of a just and a fair determination." (Brief Appendix, 11a-12 to 14a-2).

The jury was called back at 8:45 P.M. and asked by the judge if they believed there was a reasonable possibility of a unanimous verdict if they were to continue for a short time. The forelady answered, "Yes, your honor. We need a little bit more time." The judge instructed the jurors they could have all the time they needed in order to arrive at a just result, and returned them to the juryroom at 8:48 P.M. (Brief Appendix, 14a-6 to 15a-4).

At 9:05 P.M., as the judge advised counsel, the jury had sent a note to the court stating, "we are far from the decision at this time." The court indicated it was then prepared to send the jurors to a motel until the following morning. Defense counsel then expressed his belief that the jury was hopelessly deadlocked, adding:

> "I think this Court should declare a mistrial. They deliberated for some eleven hours and once they announced that they are far from reaching a decision I think the only appropriate action at this time would be to declare a mistrial."

The State registered its objection to that requested action, and the court proceeded to the preparations for the removal of the jury (Brief Appendix, 15a-19 to 16a-20). The jurors were returned to the Courtroom at 9:55 P.M., where the judge advised them they would be transported to a motel for the night, to be returned to the Court the next morning (Saturday, December 18) at 9:00 A.M. to resume deliberations. (Brief Appendix, 17a-1 to 18a-3).

On the return of the jurors the next morning, the court greeted them with the hope that they had a good night's rest so that they could continue to deliberate, and the jurors returned to the jury room for further de-

liberations at 9:28 A.M. (Brief Appendix, 20a-4 to 23). Subsequently the jurors made a request for various portions of the testimony and, after conferring with counsel and assembling the requested testimony, the court recalled the jury at 11:26 A.M. and the reporter read back the testimony and instructions (Brief Appendix, 21a-14 to 39a-24). The jury retired at 11:50 A.M., was recalled at 11:58 A.M. and 12:08 P.M. for clarification of instructions and further testimony, and were returned to deliberations at 12:15 P.M. (Brief Appendix, 40a-20 to 47a-23).

At 2:25 P.M., the jury returned to the courtroom where the trial judge asked whether the jury had arrived at a unanimous verdict. The forelady answered, "Not yet, your honor." The trial judge then declared:

> "Well, last night there was a question in the Court's mind after reviewing with counsel as to whether or not because of the long time that you spent here, whether it would be fair to let the jury continue to deliberate. I felt I wanted to have a full opportunity for you to review and to deliberate and, therefore, I arranged for you to have the unpleasantness of going to a motel, which you did, and since then you have had breakfast, you deliberated, you have had lunch, and I noticed as you walked out so very wearily and I appreciate very much all that you have done and I am satisfied that it would not be fair to the defendants, nor to the State if in your weariness you arrived at unanimity just for the sake of entering a verdict. I feel that this requires you to be alert and that the time has passed when there is a risk that your verdict would not really represent what you actually feel would be just.

> So that under the circumstances I am going to declare a mistrial and I won't impose upon you any longer than I have. I have imposed upon you because I felt that I had to because of the seriousness of the charge against the defendant that he was entitled to have judged by you and, under the circumstances, I am going to excuse you." (Brief Appendix, 47a-24 to 49a-11).

Counsel indicated that "perhaps in chambers, I would like to put a statement on the record," and thereafter noted his objection to the court's having declared the mistrial on the response of the forelady that the jury had not yet reached a verdict. The judge noted counsel's observation, made the previous evening, that a mistrial should then have been declared, the court adding, "many hours have elapsed since then and within my discretion I felt that what I did was in the interests of justice." (Brief Appendix, 50a-15 to 51a-13).

At a hearing held before the trial judge on the defendant's motion for dismissal of the murder indictments on the ground of double jeopardy, the court reconstructed the progress of the deliberations of December 17, including defense counsel's objection to an overnight stay and his opinion a mistrial was called for that evening, and the court's determination to permit the jury to continue deliberating following a night's rest (Appendix of Respondent-Appellant, filed with the Court of Appeals, 17a-7 to 19a-2). The judge noted the change in the juror's demeanor by the afternoon of December 18:

> "Now, on the previous occasions that day when the jury emerged from their room the Court had observed what was happening, what had started out to be an alert, neatly dressed and a neatly

> appearing jury. The men's ties were off and all the parties appeared to be discheveled in appearance. I asked the forelady if the jury had arrived at a unanimous verdict and she exhaustedly said, 'not yet'. I described to the jury my observations of it wisely entering the jurybox and my concern lest their evident condition lead to an unjust verdict." (Respondent-Appellant Appendix, 20a-10 to 20)

and concluded that, from an examination of the case law established by the United States Supreme Court and in light of the circumstances, the action of the court had been proper (Respondent-Appellant Appendix, 22a-3 to 23a-20).

4. The Findings of the United States District Court and the Court of Appeals for the Third Circuit on the Double Jeopardy Issue.

Declaring the decision of the United States District Court, District of New Jersey, Judge Fisher recited the events following the juror's retirement for deliberation, noting the issue before the Court hinged solely on the action of the trial judge in declaring the mistrial after some seventeen hours of deliberation when neither party had moved for a mistrial, although the defendant had moved for a mistrial the previous evening. Judge Fisher quoted the applicable law and ruled:

> "In my view Judge Schwartz acted properly in exercising his discretion to conclude the trial at the point he did. The record indicates that the Court was moved to do what he did by the obvious exhaustion of the jury and his fear that an unjust result would occur if the jury was allowed to continue its deliberation."

The Court accordingly denied the application for the writ of habeas corpus but "since the question is close", certified the existence of probable cause for appeal (Appendix C, 32a).

The Court of Appeals also reviewed the facts* and the law but ruled that there was no "manifest necessity" for the declaration of the mistrial, that there was no support in the record for the trial judge's determination of the juror's physical condition, and consequently the State could not retry the defendant. Unlike the District Court which had stated the matter was a close one, but had ruled that the trial judge had acted properly in declaring the mistrial, the Court of Appeals opined it was not a close case (Appendix A, 21a).

Reason for Granting the Writ

In finding there was no manifest necessity for the declaration of the mistrial, the Court of Appeals clearly departed from the established abuse-of-discretion principle of appellate review first set forth in *United States* v. *Perez* and, viewed uned the proper test of review, as was done by the District Court, the action of the trial judge was proper and reprosecution is not barred.

The issue before the Court of Appeals concerned the propriety of the action of the trial judge in declaring a mistrial upon being advised by the jury on the afternoon of the second day of deliberation, following at least fifteen and possibly up to seventeen hours of deliberation, that they had not yet reached a verdict. The trial

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* While the Prosecutor and the District Court had stated the jury had been deliberating for seventeen hours, the Court of Appeals stated the time at fifteen hours.

judge had further acted out of a growing awareness of juror weariness. The Court of Appeals found there to have been no "manifest necessity" for the declaration of the mistrial, thus preventing the State from retrying the defendent who stands accused of perpetrating two wilful, premeditated and deliberate murders. Petitioner maintains the ruling of the Court, in the manner of the review of the trial judge's action, and its conclusion, runs contrary to almost one hundred and fifty years of law established and continually adhered to by the United States Supreme Court and that, as reviewed under the proper principles, the judge's action in terminating the trial should be sustained and the State should not be precluded from seeking to obtain a final judgment of guilt or innocence.

It is well established that while a defendant is deemed to be in jeopardy in a criminal proceeding once he is put to trial before the trier of fact, the requirement for completion of a trial once begun is not an inexorable one. Termination of the initial proceeding prior to the rendering of a verdict will not necessarily preclude reprosecution through a plea of former jeopardy. To rule otherwise

> "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblence of the type of oppressive practices at which the double jeopardy prohibition is aimed."
>
> *Wade* v. *Hunter,* 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L. Ed. 2d 974 (1949)

As more recently stated by the Court in *United States* v. *Jorn,* 400 U.S. 470, 480, 91 S. Ct. 547, 554 (1971):

> "A mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of a personal security and freedom from governmental harassment which such a rule would provide."

In recognition of the complex nature of the criminal trial and the myriad of unforeseeable circumstances which may lead to its discontinuance prior to its assumed conclusion with a verdict of guilt or innocence, the Supreme Court has utilized a rule of flexibility in judging the propriety of a trial court's declaration of a mistrial —a rule which places the principal emphasis on the discretion of the trial judge. This standard was first enunciated by Mr. Justice Story in *United States* v. *Perez,* 9 Wheat. 579, 6 L. Ed. 165 (1824) in writing for a unanimous court which was faced with the same question raised in the present matter, whether a defendant, charged with a capital offense, could be retried, consistent with the prohibition against double jeopardy, where the trial judge had declared a mistrial over defendant's objection because of the failure of the jury to agree on a verdict. Answering in the affirmative, Mr. Justice Story wrote:

> "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the

> power ought to be used with the greatest caution, under urgent circumstances and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge, and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." *Id.* at 580, 6 L. Ed. at .

The *Perez* doctrine has since been the "constitutional touchstone for determining when reprosecution may follow an aborted trial". 77 Hav. L. Rev. 1272, 1276 (1964), "Double Jeopardy: The Reprosecution Problem". See *Jorn, supra,* 91 S. Ct. at 555; *Illinois* v. *Somerville,* —— U.S. ——, 93 S. Ct. ——, 35 L. Ed. 2d 425, 429 (1973), "The fountainhead decision construing the Double Jeopardy Clause in the context of a declaration of a mistrial over a defendant's objection is United States v. Perez . . ." For almost one hundred and fifty years, in reviewing the propriety of the trial judge's declaration of a mistrial in accordance with the *Perez* doctrine, this Court has repeatedly emphasized the discretionary nature of this authority and the consequent standard of appellate review, which should properly be restricted to a determination of whether the judge had committed an abuse of discretion in his determination of the need to abort a trial. See, aside from *Perez,* itself, *Logan* v. *United States,* 144 U.S. 263, 36 L. Ed. 429 (1892):

> ". . . *whether the discharge of the jury was manifestly necessary* in order to prevent a defeat of the ends of public justice, *was a question to be finally decided by the presiding judge in the sound*

exercise of his discretion." Thompson v. *United States,* 155 U.S. 274, 15 Sup. Ct. 17, 39 L. Ed. 146 (1894):

". . . courts of justice are invested with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated . . ."

Brock v. *North Carolina,* 344 U. S. 424, 73 S. Ct. 349, 97 L. Ed. 456, 459 (1952):

"This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will best be served."

In its most recent decision in this area, *Illinois* v. *Somerville, supra,* the Court again noted the consistent reiteration of the broad discretion, reserved in the trial judge. 35 L. Ed. 2d at 429. Mr. Justice Rehnquist approvingly cited *Gori* v. *United States,* 367 U. S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 902 (1961) as having "again underscored the breadth of a trial judge's discretion, and the reasons therefore, to declare a mistrial", and quoted from the opinion of Mr. Justice Black in *Gori*:

"Where for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment."

Thus, a reviewing Court, while adjudging whether under the circumstances "manifest necessity" or the ends of public justice" justified the declaration of a mistrial, is still determining a question of the exercise of judicial discretion, which under the traditional concept of such a standard of review, does not empower the reviewing court to substsitute its judgment for that of the exercising court but is restricted to determining whether there was an abuse of discretion—i.e. whether the court's action was arbitrary or unreasonable, without any basis in reason on the record[1] The continued validity of the abuse-of-discretion principle was emphasized by the majority in *United States* v. *Jorn, supra,* 915 S. Ct. at 556, while expressing doubt as to viability of the "variation" upon the standard expressed in *Gori* v. *United States, supra,* looking to which party was principally benefited by the mistrial. It was implicit in the language employed by Mr. Justice Rehnquist in *Illinois* v. *Somerville* that the reviewing court, pursuant to the scope of this

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[1] As the Supreme Court said in *Brown* v. *United States,* 346 U. S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589, 596 (1958):

> "We are not justified in sliding from mere disagreement with the way in which the trial court has dealt with a particular matter . . . into a condemnation of the court's action as an abuse of discretion."

See also, *N.L.R.B.* v. *Guernsey-Muskingum Elec. Co-op. Inc.,* 285 F. 2d 8, 11 (6th Cir. 1960):

> "There is no exact measure of what constitutes an abuse of discretion. It is more than the substitution of the judgment of one tribunal for that of another . . . 'Even when an appellate court has power to review the exercise of such discretion, the inquiry is confined to whether such situation and circumstances clearly show an abuse of discretion, that is, arbitrary action not justifiable in view of such situation and circumstances.' "

abuse-of-discretion principle of review, is solely to decide if there was a reasonable basis for the court's mistrial declaration, "We hold that the mistrial met the 'manifest necessity' requirement of our cases, since the trial court *could reasonably* have concluded that the 'ends of public justice' could be defeated by allowing the trial to continue." 35 L. Ed. 2d at 428.

While it may appear that petitioner belabors this point, to the detriment of the discussion of the substantive question here, we do so because of our firm conclusion that the Court of Appeals has clearly departed from this appropriate standard of review and has, instead, resorted to its own independent judgment of the circumstances and proper judicial responses thereto—in effect, second-guessing the trial judge, substituting its judgment for that of the tribunal "best situated intelligently to make such a decision." This improper action by the Court of Appeals is implicit in the Court's questioning of what the trial judge did not do or should have done in regard to ascertaining the progress toward deliberation and juror weariness (16a-18a). Such questioning, as a method of appellate review, appears to substantiate here the fears expressed by the dissent (Mr. Justice Stewart with Mr. Justice White and Mr. Justice Blackmun joining) in *Jorn, supra,* that the majority's determination of the trial judge's abuse of discretion therein was in effect the measure of his action in declaring the mistrial against some standard of good trial practice. 91 S. Ct. at 560, 561. The apparent authority claimed for this improper manner of review is to be found in the Court of Appeal's assertion that "This is a mixed question of fact and law which we can freely review," the Court then citing *Townsend* v. *Sain,* 372 U. S. 293, 309, n. 6 and *United States ex rel Thomas* v. *State of New Jersey,* 472 F. 2d 735, 737,

738 (3rd Cir. 1973). However, these cases which deal with the application of the presumption of correctness in federal courts of factual issues determined in state trials have no bearing on the scope of review of mistrial declarations in the context of double jeopardy claims. They can in no way be construed as authority for the proposition that the reviewing court is to make an independent judgment *de novo* of the desirability of the trial termination, in violation of the appellate review principles followed since 1824. This aspect of the Court of Appeals ruling itself should merit review by this Court so as to reassert the proper principle of review.

The wisdom of the policy which looks primarily to the sound discretion of the tribunal on the scene has been noted previously, in the quotation of Mr. Justice Black in *Gori, supra,* noting the peculiarly advantageous position of the trial judge. An appellate panel, if permitted to make a judgment anew of the necessity to terminate a trial prior to verdict solely on the basis of a bare emotionless record, months or even years after the events, may not necessarily arrive at the proper determination. We maintain here, as a further ground for review by this Court, that the ruling of the Court of Appeals, in finding there to have been no "manifest necessity" for the mistrial, has been such an erroneous ruling in substance, as well as in procedure. As was noted in *Haley* v. *Ohio,* 332 U. S. 596, 624-25, 92 L. Ed. 224, 241 (dissenting opinion of four Justices), in regard to evaluating credibility of witnesses in open court:

> ". . . we must give trial courts and jurors that wide discretion in this field in which a living record, as distinguished from a printed record, logically entitles them. In this living record there are many guidepoints to the truth which are not in the

> printed record. Without seeing them ourselves, we will do well to give heed to those who have seen them."

This is particularly true in the context of the present matter, where we are concerned with the propriety of a trial terminated because of a jury unable to attain agreement on a verdict, said, jury being observed, at least by the judge on the scene, as growing increasingly wearisome. The language of the Court of Appeals in *Cleary* v. *Indiana Beach, Inc.*, 275 F. 2d 543 (7th Cir. 1960), cert. den. 364 U. S. 825, 81 S. Ct. 62, 5 L. Ed. 2d 53 (1960), concerning the trial court's discretionary power to separate the jurors to obtain rest during deliberations, is particularly relevant here:

> "The trial judge is in a better position than we are to appraise the intangibles determinative of the question whether separation ought to be allowed. He is in a position to make an informed guess whether a jury is hopelessly deadlocked, or whether further deliberation is likely to be fruitful and avoid retrial of a prolonged case. He is also in the position to determine whether deliberation has continued for such a length of time and to such an extent that weariness of the jurors is likely to preclude impartial and fruitful deliberation if deliberation is continued without pause." 275 F. 2d at 546.

It was precisely this circumstance, a jury deadlock and juror weariness, that caused the trial judge to find the "manifest necessity" for a mistrial declaration, this determination that the ends of public justice would be defeated should he continue the jury to deliberate and finally render an unjust verdict. The record amply justifies this finding. The conclusion of the Court of Ap-

peals that there was no manifest necessity was clearly erroneous.

After a trial of some three weeks, this murder case went to the jury in the morning of December 17, 1971 and the jury deliberated from 10:35 A.M. to 7:05 P.M. when the trial judge called out the jury, gave them a supplemental instruction and ordered them to continue to deliberate. At 8:20 P.M. the judge asked the jury to advise him if they could agree on a verdict shortly, noting that they had reached the point where they could be tiring; at 8:45 P.M. the jury advised the Court they would need only "a little bit more time". However, at 9:50 P.M. (again on the first day of deliberation, December 17) the jury informed the court it was "far from the decision at this time". It was then that counsel for the accused wished the trial to be terminated, formally requesting a mistrial as the only appropriate action to take at this declaration of the inability of the jury to bring in a verdict after eleven hours of deliberation. Had the court concurred in defense counsel's assessment that the jury had fruitlessly deliberated long enough and that termination of the trial was necessary, the declaration of a mistrial at this point would not be considered improper and reprosecution would not be barred. *United States* v. *Tateo*, 377 U.S. 463, 467, 84 S. Ct. 1587, 1590, 12 L. Ed. 2d 448, 452; *Jorn, supra*, 91 S. Ct. at 557.[2] However, despite counsel's desire to have the trial stopped at this juncture, the trial judge continued the proceedings till the next morning, to hopefully enable the jurors to pursue productive deliberations following a night's rest. Can it thus be denied that the trial judge, in determining not to abort the trial at this time, was zealously

[2] We must at this point also question the opinion of the Court of Appeals that such a defense motion did not amount to a waiver of the right to object to retrial on double jeopardy grounds.

seeking to protect "the interest of the defendant in having his fate determined by the jury first impaneled"? *Illinois* v. *Somerville, supra,* 35 L. Ed. 2d at 435.

Thus, as a result of the trial judge's desire to preserve "defendant's valued right to have his trial completed by a particular tribunal", *Wade* v. *Hunter, supra,* 69 S. Ct. at 837, the jury was sent to a motel for the evening and returned to the courtroom the next morning, where the court expressed the hope the jurors were rested, and, at 9:28 A.M. (December 18, 1971), sent them back to the juryroom to resume deliberation. The jury continued the effort to reach a verdict throughout the morning and early afternoon until, at 2:25 P.M., the court again inquired of the success of the jury in obtaining agreement. The forelady responded "Not yet". The judge was then moved by this expression of a hung jury, and his fear that with increasing weariness the jury would return a verdict which "would not really represent what you actually feel would be just", to declare the mistrial.

We submit the circumstances before the trial judge clearly show the "manifest necessity" for this action, contrary to the finding of the Court of Appeals, and that having acted in proper exercise of his discretion, a retrial will not be precluded by the prohibition against double jeopardy. In almost one hundred and fifty years of review, the Supreme Court has yet to consider the declaration of a mistrial in the face of an unresolved jury to constitute an abuse of discretion. See *United States* v. *Perez, supra; Ex parte Lange,* 18 Wall. 163, 21 L. Ed. 872 (1874); *Logan* v. *United States,* 144 U.S. 263, 36 L. Ed. 429 (1892); *Keerl* v. *Montana,* 213 U.S. 135, 29 S. Ct. 469, 53 L. Ed. 734 (1909). In *Logan* and *Keerl,* the court has specifically upheld the declaration

of mistrial in murder prosecutions as is the case here. In fact, despite the general prohibition against categorizing the types of situations which would justify termination of the trial, the Court has in effect denominated the situation before the trial judge below as clearly mandating mistrial. As Mr. Justice Douglas said in *Downum* v. *United States*, 372 U.S. 734, 83 S. Ct. 1033, 1034, 10 L. Ed. 2d 100, 102 (1963):

> "From United States v. Perez, 9 Wheat. 579, 6 L. Ed. 165, decided in 1824, to Gori v. United States, 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901, decided in 1961, it has been agreed that there are occasions when a second trial may be had although the jury impaneled for the first trial was discharged without reaching a verdict and without the defendant's consent. The classic example is a mistrial because the jury is unable to agree."

Mr. Justice Rehnquist, in *Illinois* v. *Somerville, supra*, while noting the importance of the particularities of each case, stated that one could observe from them a "general approach, premised on the public justice policy of United States v. Perez", writing:

> "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached . . ." 35 L. Ed. 2d at 431

Such was the situation at trial below, yet the Court of Appeals has considered there to have been no "manifest necessity". In accord with the language of the Supreme Court above, the lower federal courts have found contrary to the Court below, affirming the exercise of discretion of the trial judge to declare a mistrial in the face of a jury unable to agree after hours of delibera-

tion. See, e.g. *Dortch* v. *United States,* 203 F. 2d 709 (6th Cir. 1953), cert. den. 346 U.S. 814, 74 S. Ct. 25, 98 L. Ed. 342 (1953); *Rothaus* v. *United States,* 319 F. 2d 528 (5th Cir. 1963); *Tolan* v. *United States,* 370 F. 2d 799 (9th Cir. 1967), cert. den. 387 U.S. 932, 87 S. Ct. 2052, 18 L. Ed. 2d 994 (1967); *Grogan* v. *United States,* 394 F. 2d 287 (5th Cir. 1967), cert. den. 393 U.S. 830, 89 S. Ct. 97, 21 L. Ed. 2d 100 (1968); *United States* v. *Brahm,* 459 F. 2d 546 (3rd Cir. 1972); *United States* v. *Medina,* 323 F. Supp. 1277 (E. D. Pa. 1971).

The Court of Appeals cites *United States* v. *Lansdown,* 406 F. 2d 164 (4th Cir. 1972) in support of its ruling that termination of the proceeding was unwarranted. In recognition of the principle that each case must be decided upon consideration of its particular facts, the contrasts between the situation in *Lansdown* and the instant case lend support to the conclusion that the trial judge below acted properly. The Court of Appeals in *Lansdown* found there to have been no "manifest necessity" for the declaration of a mistrial by the trial court which "without considering any other factors, simply concluded that approximately 11 hours of deliberation . . . was long enough." No such charge of a simplified consideration of the issue can be leveled against the trial judge here, who was concerned not only with the bare fact of the seventeen hours of deliberation but with the potential for an improper verdict borne of weariness, balanced against the right of the defendant to have this jury determine his guilt or innocence. These factors were clearly noted in the trial judge's mistrial declaration. In *Lansdown,* the court did not seek the opinion of counsel, did not inquire if the jury were near a verdict, and disregarded the jurors comments that they were "on the verge of a verdict." *Ibid.* Here, the mistrial was declared following a day's deliberation *after*

the defense counsel had expressed his opinion the jury was already deadlocked, without any indication from the jury, following the court's inquiry, that they were near to a verdict. The situation presented to the trial judge in *Lansdown* was comparable to that facing the judge below on December 17, the day prior to the mistrial where, ten hours after retiring to deliberate, the jury had advised the judge, "We need a little more time." Rather than abort the proceedings, as was improperly done in *Lansdown*, the judge, following the suggested procedure of the Fourth Circuit, continued the jury's deliberation further into the evening until it became clear a verdict was not imminent.

After additional hours of deliberation the next morning and afternoon, the jury announced it had not yet reached a verdict. The Court of Appeals considers the words of the forelady "Not yet, your honor" as "perfectly consistent with a jury actively deliberating, i.e. as reflecting an expectation of agreement, citing an interpretation to this effect in *People ex rel. Stabile* v. *Warden, City Prison*, 202 N. Y. 138 (Ct. App. 1911). However, in *Stabile* the response was rendered after less than five hours of deliberation, not after seventeen hours of deliberation conducted over two days, during which hopes for an early resolution of the matter had appeared and then faded. Moreover, the Court of Appeals below was not "best situated intelligently" to determine the implications behind the forelady's negative response, with regard to juror weariness and prospects for a speedy decision. See *Cleary* v. *Indiana Beach, Inc., supra.* The trial judge, on the scene, had characterized the forelady as having answered "exhaustedly", and further noted, in his opinion denying the post trial motion to dismiss, the changing demeanor of the jurors, regressing from "an

alert, neatly dressed and a neatly appearing jury" into one "discheveled in appearance . . . wearily entering the jurybox."

By a proper scope of review of the record of the trial proceedings below, we assert the action of the trial judge in finding manifest necessity for its termination prior to verdict was reasonable and proper; that through "a scrupulous exercise of judicial discretion" he came to the warranted conclusion that the ends of public justice and the rights of the defendant and the State would not be served by a continuation of the proceedings. The opinion of the Court of Appeals finding there to have been no "manifest necessity" for his action is contrary to law and the facts. The State seeks not to harass the defendant, not to persecute him or to obtain a verdict of guilt not founded upon the evidence. Rather, we seek, in the name of the people of the State, in a case where the responsibility for a double murder stands unresolved, to preserve "the public's interest in fair trials designed to end in just judgments." This we are prevented from so doing by the lower Court's erroneous decision. We therefore seek review by this Court.

CONCLUSION

For the reasons included herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH D. J. GOURLEY,
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Attorney for Petitioners,
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GARY H. SCHLYEN,
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Of Counsel with Petitioner.

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-2154

UNITED STATES ex rel. JOSEPH RUSSO,

Appellant,

v.

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY, PASSAIC COUNTY COURT, LAW DIVISION, and JOSEPH D. J. GOURLEY, PASSAIC COUNTY PROSECUTOR,

Appellees.

(D. C. Civil Action No. 1304-72)

Appeal From the United States District Court
For the District of New Jersey

Appendix A

Argued April 30, 1973

Before HUNTER and WEIS, *Circuit Judges*, and NEWCOMER, *District Judge*

CUMMINS, CUMMINS, DUNN, HOROWITZ, ROSNER & PASHMAN,
Attorneys for Appellant

JOSEPH D. J. GOURLEY
Attorney for Appellees

GARY H. SCHLYEN
On the Brief

OPINION OF THE COURT

(Filed July 24, 1973)

HUNTER, *Circuit Judge:*

This is an appeal from the denial of a writ of habeas corpus by the district court. Appellant Joseph Russo has been accused of committing first degree murder. His first denial ended in a mistrial over his objection.[1] He contends that for the state to retry him would violate the Fifth Amendment's prohibition against double jeopardy.

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[1] Between the denial of his motion for certification by the New Jersey Supreme Court and his petitioning for a writ of habeas corpus, appellant was retried. There was another mistrial. His double jeopardy claim arises from the first mistrial.

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After his mistrial, appellant moved for a dismissal of the indictments against him. His motion was denied by the trial court. Leave to file an interlocutory appeal was denied by the Appellate Division of the New Jersey Superior Court, and the New Jersey Supreme Court declined to certify the case. Appellant then filed a petition for a writ of habeas corpus. An appeal to this court followed the denial of appellant's petition by the district court.[2]

A full factual exposition is necessary to an understanding of appellant's double jeopardy contention. Appellant has been charged with two murders at a party at his home. His trial on these charges began on December 3, 1971, and ended in a mistrial on December 18, 1971.

The state's principal witness testified that he had seen appellant shoot the victims. But the defense produced a witness who testified that in fact it was the state's witness who had killed the decedents. The state's witness had testified that appellant had fired at one of the victims from close range (two feet) while the defense witness claimed that the state's witness had shot from a distance of seven or eight feet.

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[2] The Chronology of these events is as follows:

18 December 1971—Mistrial declared; 1 May 1972—Motion to dismiss indictments denied. 23 May 1972—Leave to appeal denied by Appellate Division of the New Jersey Superior Court. 1 June 1972—Certification denied by the New Jersey Supreme Court. 5 June 1972—Retrial commenced on indictments. 17 June 1972—Retrial ends in mistrial. 31 July 1972—Appellant files his petition for a writ of habeas corpus.

The defense then produced a special agent of the Federal Bureau of Investigation. The agent stated that he was not able to find any powder residue on the clothing of the victims and that the presence of powder residue was related to the distance of the gun from the victim. He testified that six to eight feet was the maximum distance at which there could be powder residue on the clothing. That is, it was possible that if the weapon were fired from closer than eight feet, there could be no powder residue. But if it were fired from beyond six to eight feet, there definitely could be none.

> "The Court: In other words, what you're saying is that if the gun was shot beyond six to eight feet, no matter how far beyond, it wouldn't show powder residue, but if it was shot between the gun barrel and the victim within—if the distance was less than eight feet there could be residue. Is that what you're saying?
>
> "The Witness: Yes, sir, it could. It could be closer, but he is asking me for the maximum distance and I would say eight feet would be the maximum distance at which you wouldn't find with any of those barrel lengths." Appellant's Appendix, 45a-46a.

The witness further testified that if the victims had been shot from close range, powder residue would have been left on the clothing.

> "Question: How about residue from two to eighteen inches?
>
> "Answer: Yes, sir.
>
> "Question: Beyond that would there be any?

Appendix A

"Answer: Beyond there, out to probably three to four feet, you might have residue." Appellant's Appendix, 47a.

The testimony of the F.B.I. agent thus tended to support the testimony of the defense's witness. As so often happens, credibility was a key question for the jury.

After hearing testimony for nine days, the jury was charged on the morning of December 17, 1971. The jury began deliberating at 10:35 a.m. At 7:05 p.m., the court recalled the jury to give them a supplemental charge. At 8:20 p.m. the trial court again recalled the jury. The court instructed the jurors to retire and to determine among themselves whether they would be able to reach a verdict shortly. If they could not, they would have to spend the night in a motel. The jury returned to the jury room, and defense counsel objected that the court was "putting undue pressure on the jury at this point to arrive at a verdict."

The jury came back to the courtroom at 8:45 p.m. The following dialogue occurred:

> "The Court: Madam Forelady, I don't want you to give me any figures. I don't want you to make any statement whatsoever except to respond to my question as to whether you believe that if you stay for a short time here there is a reasonable possibility of you arriving at a unanimous verdict.
>
> "Madam Forelady: Yes, your Honor. We need a little bit more time.
>
> "The Court: A little bit more time.
>
> "Well, the Court will be very happy to make that available for you, but you must understand that you can have all the time that you need whether

> it is tonight or whether it would be tomorrow. Time is no problem. Those of us who are employed by the County are prepared, as a part of our responsibility, to give the full time to a jury and you folks should understand that you have the full time in order to arrive honestly, without sympathy, without prejudice, without fear, just having in mind what is a just result." Appellant's Appendix, 14a.

The jury returned to the jury room. At 9:50 p.m. they sent a note to the court indicating that at that time they were far from reaching a verdict. The court then decided to have the jury spend the night in a motel. These events prompted the defense counsel to move for a mistrial on the grounds that the jury was "hopelessly deadlocked." The state indicated it would object to any grant of a mistrial. The court did not specifically rule on the defense motion, but sent the jury to a motel.

The next morning the court sent the jury out to deliberate at 9:28 a.m. Minutes later, the jury sent a note to the judge requesting, among other things, the testimony of both the state's witness and the defense's witness as to the distance of the gun from the victims and the testimony of the F.B.I. agent about the relation of powder residue to distance.

The rest of the morning was devoted to assembling the portions of testimony requested by the jury. It is unclear whether the jury was deliberating from the time of its request until 11:30 a.m. when the portions of the record they had asked for were read to them by the court. The jury retired at 12:15 p.m. for lunch and to continue deliberating. At 2:25 p.m. the court called the

jury back to the courtroom, where, as the record shows, the trial judge declared a mistrial without warning to or consultation with either the defense or the prosecution:[3]

> "Madam Forelady, I want to ask you a question and I don't want any numbers from you. I would like to get a yes or no answer. Has the jury arrived at a unanimous verdict?
>
> "The Forelady: Not yet, your Honor.
>
> "The Court: Well, last night there was a question in the Court's mind after reviewing with counsel as to whether or not because of the long time that you spent here, whether it would be fair to let the jury continue to deliberate. I felt I wanted to have a full opportunity for you to review and to deliberate and, therefore, I arranged for you to have the unpleasantness of going to a motel, which you did, and since then you have had breakfast, you deliberated, you have had lunch, and I noticed as you walked out you seem to be walking very wearily and I appreciate very much all that you have done and I am satisfied that it would not be fair to the defendant, nor to the State if in your weariness you arrived at unanimity just for the sake of entering a verdict. I feel that this requires you to be alert and that the time has passed when there is a risk that your verdict would not really represent what you actually feel would be just.
>
> "So that under the circumstances I am going to declare a mistrial and I won't impose upon you any longer than I have. I have imposed upon you

[3] At this time the jury had deliberated for approximately fifteen hours.

> because I felt that I had to because of the seriousness of the charge against the defendant that he was entitled to have judged by you and, under the circumstances, I am going to excuse you." Appellant's Appendix, 48a-49a.

Appellant objected to the granting of the mistrial in the judge's chambers after the jury had been dismissed. It is this declaration of a mistrial upon which appellant's double jeopardy contention is based.

Appellant has presented one other ground for relief. He alleges that the walls of the jury room in which the jury deliberated here were thin enough to permit outsiders to overhear conversations that occurred inside the room. As a result of this structural defect, he further alleges, it was common knowledge that the jury in his case was leaning towards acquittal. He claims that he is entitled to an evidentiary hearing as to whether the trial judge had this knowledge and whether he based his decision to declare a mistrial on it. The district court denied his request.

Jurisdiction

Although the state has not questioned our jurisdiction to hear this case, we feel that a brief jurisdictional statement is necessary. Appellant is presently released on $75,000 bail pursuant to Article I, Chapter 11 of the New Jersey Constitution and Rule 3:26, Revised Rules of Court of New Jersey. He presented his double jeopardy claim to the state courts so he has exhausted his state remedies.

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The Supreme Court has recently held that a defendant released on his own recognizance is "in custody" within the meaning of 28 U.S.C. §§241(c)(3), 2254(a). *Hensley* v. *Municipal Court,* 41 U.S.L.W. 4513, (U. S. April 18, 1973). The only difference between *Hensley* and our case is that Hensley had been convicted of a misdemeanor and was awaiting sentence when he petitioned for habeas corpus while appellant has not yet been convicted.

This is not a significant difference. In *Burris* v. *Ryan,* 397 F. 2d 553 (7th Cir. 1968), the petitioner was initially charged with rape. That charge was dismissed following a mistrial. The petitioner was then charged with rape, indecent liberties, and contributing to the delinquency of a minor. While on bail and before trial he petitioned for habeas corpus. The court held that he was "in custody" at this time. Other courts have made similar rulings. *Matzner* v. *Davenport,* 288 F. Supp. 636, 638 n.1 (D. N. J. 1968), *aff'd.,* 410 F. 2d 1376 (3d Cir. 1969); *Foster* v. *Gilbert,* 264 F. Supp. 209, 211-212 (S. D. Fla. 1967).

If appellant had been tried in federal court, we could hear his double jeopardy claim even though he had not yet been convicted. *United States* v. *Lansdown,* 400 F. 2d 164, 170-172 (6th Cir. 1972).

In view of *Hensley, Lansdown and* the policy behind the double jeopardy clause, we feel that it is proper for appellant to present his claim. One of the main purposes of the double jeopardy clause is to prevent citizens from being subjected to the ordeal of another trial. *United States* v. *Green,* 355 U. S. 184 (1957). See page 11, *infra.* We see no reason sufficient to subvert this purpose by forcing appellant to condition assertion of his right upon conviction. Accordingly, we hold that this court does have jurisdiction under 28 U.S.C. §§2241(c)(3), 2254(a).

Appendix A

Double Jeopardy

The prohibition against double jeopardy contained in the Fifth Amendment, made applicable to the states by *Benton* v. *Maryland*, 395 U. S. 784 (1969), has been recognized as a fundamental American right. Behind that clause is a deep concern that the government should not be able to use its vast power and resources to subject a citizen to repeated prosecutions for the same alleged offence. Reprosecution increases the possibility that an innocent man may be found guilty; and it forces a defendant through the ordeal of another criminal trial, involving additional anxiety, insecurity, embarrassment, and expense. *E.g. Green* v. *United States*, 355 U. S. 184, 187-188 (1957). When a mistrial is declared, another policy also is relevant: the defendant may have been deprived of " 'a valued right to have his trial completed by a particular tribunal,' "[4] which he believes may be "favorably disposed to his fate."[5]

For these reasons the courts have consistently adhered to the standard formulated by Justice Story in *United States* v. *Perez*, 9 Wheat. (22 U. S.) 579, 580 (1824) in determining whether a trial judge properly exercised his discretion in declaring a mistrial without a defendant's consent:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority

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[4] *United States* v. *Jorn*, 400 U. S. 470 (1971), quoting from *Wade* v. *Hunter*, 336 U. S. 684, 689 (1948).

[5] *United States* v. *Jorn*, *supra* at 486.

> to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious cases; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office."

"Manifest necessity" must be present, then, for a trial judge to declare a mistrial and still preserve for the state the right to prosecute a defendant. What constitutes "manifest necessity" is unclear. The Supreme Court has stated that its decisions "escape meaningful categorization;" and the court has emphasized that each case must necessarily turn on its particular facts. *Illinois* v. *Somerville,* 41 U.S.L.W. 4319, 4321 (U.S. Feb. 27, 1973).

A trial judge has a broad discretion to determine what factual situations merit a mistrial and allow a defendant to be reprosecuted. *Illinois* v. *Somerville, supra.* But while the Supreme Court has refused to make hard and fast rules about when mistrials may be declared, it has

always recognized that trial judges may declare a mistrial without barring reprosecution only in extraordinary circumstances.[6]

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[6] *E.g. United States* v. *Perez*, 9 Wheat. 579, 580 (1824):

> "To be sure, the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious cases; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner.

Simmons v. *United States*, 142 U. S. 148 (1891), quoting *Perez* "test." *Logan* v. *United States*, 144 U. S. 263 (1892), citing *Perez*. *Wade* v. *Hunter*, 336 U. S. 684, 692 (1948):

> "This case presents extraordinary reasons why the judgment of the Commanding General should be accepted by the courts."

Gori v. *United States*, 367 U. S. 364, 368 (1961):

> "Where, for reasons deemed compelling by the trial judge . . . a mistrial may be declared . . . and he [the defendant] may be retried . . ."

Downum v. *United States*, 372 U. S. 734, 736 (1963):

> "The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances,' to use the words of Mr. Justice Story in *United States* v. *Coolidge*, 25 Fed. Cas. 622, 623."

United States v. *Jorn*, 400 U. S. 470, 485 (1971):

> "The *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not

(Footnote continued on following page)

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Some of the cases, in the words of Justice Douglas, involved "a breakdown in judicial machinery," *Gori* v. *United States*, 367 U.S. 364, 372 (1961) (dissenting opinion), in which there was no chance of prosecutorial or judicial manipulation that could subject a defendant to a second prosecution when a conviction might not be obtained in the first. *United States* v. *Perez, supra* (deadlocked jury); *United States* v. *Simmons*, 142 U.S. 148 (1891) (juror acquainted with defendant); *Logan* v. *United States*, 144 U.S. 263 (1892) (deadlocked jury); *Thompson* v. *United States*, 155 U.S. 271 (1894), (juror disqualified for being member of grand jury which had indicted defendant); *Wade* v. *Hunter, supra*, (military campaign necessitated termination of court martial). The court has also looked at what alternatives the trial judge had available to him when he thought that a mistrial was required. *Downum* v. *United States*, 372 U.S. 734 (1963); *United States* v. *Jorn, supra.*[7]

(Footnote continued from preceding page)

be served by a continuation of the proceedings. See *United States* v. *Perez*, 9 Wheat. 579, 580 (1824)."

Illinois v. *Somerville*, 41 U.S.L.W. 4119, 4323 (U. S. Feb. 27, 1973):

> "The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly taken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one. *United States* v. *Jorn, supra.*"

[7] In *United States* v. *Gori, supra*, the court permitted a retrial because the trial judge's ruling was for the "sole benefit" of the defendant. To analyze double jeopardy cases on the basis of which party benefited from the ruling has been questioned by the Supreme Court in *United States* v. *Jorn, supra* at 483.

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The most recent Supreme Court decision in this area is *Illinois* v. *Somerville, supra.* There the court held that an obvious procedural error in the trial that would make reversal on appeal a certainty justified a retrial after a mistrial had been declared. In *Somerville,* the indictment was defective, and Illinois law would not permit it to be amended. Nor could a defendant waive the defect. Although a prosecutorial mistake was involved, the majority emphasized that the defective procedure did not lend itself to prosecutorial manipulation.[8] The only alternative in that situation was to let the trial continue and to force the state to conduct another complete trial if the defendant were to be convicted in the first one. The court held that in those circumstances the public's interest in "obtaining an impartial verdict or keeping a verdict of conviction if its evidence persuaded the jury" outweighed the defendant's right not to be retried.

In reviewing a trial court's declaration of a mistrial, then, we must at least look at the possibility of manipulation inherent in the procedure complained of, the alternatives available to the trial judge at the time, and the presence "of some important countervailing interest of proper judicial administration." *Illinois* v. *Somerville, supra* at 4323. And it must be emphasized that even in cases where there is no possibility of manipulation or prejudice to a defendant beyond that of undergoing another trial, the double jeopardy clause will bar reprosecution unless there is an *"important countervailing in-*

[8] Justice White's dissent argued that a prosecutorial error could not be a sufficient excuse to reprosecute a defendant. *Illinois* v. *Somerville, supra.*

terest of proper judicial administration." *Illinois* v. *Somerville, supra.* (Emphasis added).[9]

With these considerations in mind, we move to a review of the trial judge's determination that in this case there was manifest necessity present so that appellant can now be retried after having been deprived of a verdict by the jury then empaneled.

The trial judge decided that the jury was too exhausted to reach an impartial verdict. This, argues the state, made a mistrial a manifest necessity. While the appellant argues that no double jeopardy case has ever been decided on the basis of jury exhaustion, we are not willing to state that this could never provide the manifest necessity necessary to declare a mistrial.[10] *Cf. United States*

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[9] As Mr. Justice White stated in dissent in *Somerville*:

> "*Downum* and *Jorn*, over serious dissent, rejected the view that the Double Jeopardy Clause protects only against those mistrials that lend themselves to prosecutorial manipulation and underwrote the independent right of a defendant in a criminal case to have the verdict of the initial jury. Both cases made it quite clear that the discretion of the trial court to declare mistrials is reviewable and that the defendant's right to a verdict by his first jury is not to be overridden except for 'manifest necessity.'" Id. at 4324, 4325.

Where the majority and the dissent differed in *Somerville* is over whether there was manifest necessity to declare a mistrial.

[10] The Supreme Court has on numerous occasions made similar statements. *E.g. Downum* v. *United States*, 372 U. S. 734, 737: "Here, as in *Wade* v. *Hunter, supra,* at 691, we refuse to say that the absence of witnesses 'can never justify discontinuance of a trial.' Each case must turn on its facts."

v. *Potash*, 118 F. 2d 54, 56 (2d Cir. 1941), *cert. denied* 313 U.S. 584 (mistrial declaration upheld because a juror was "incapacitated to continue.").

We do, however, find that there was no "manifest necessity" in the present case. This is a mixed question of fact and law which we can freely review. *E.g. Townsend* v. *Sain*, 372 U.S. 293, 309 n.6; *United States ex rel. Thomas* v. *State of New Jersey*, 472 F. 2d 735, 737, 738 (3rd Cir. 1973).

As Justice Story said in *Perez*:

> ". . . [T]he power [to declare a mistrial] ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious cases; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner." Id. at 580.

No "caution" or "urgent circumstances" appear on this record. Beyond one statement made by the judge while the jury was deliberating[11] and the statement he made to

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[11] On the first day of deliberation, the judge had informed the jury that if it could not reach a verdict shortly, he would have to determine whether to send them to a motel for the night. Appellant's attorney objected that the judge was putting undue pressure on the jury, and the judge made the following statement about the propriety of sending the jury to a motel:

> "The Court: Very well.
>
> "My concern here is that the jury should be able to render a verdict while they are alert and I have some concern that as the hours pass that sometimes people tire. They may not tire, they may have enough enthusiasm for their

(Footnote continued on following page)

the jury when it was dismissed,[12] there is no support in the record for the trial judge's determination of their physical condition. The trial judge did not ask the jury about its physical condition, and the jury did not volunteer any statements. The jury never indicated that it was exhausted. Nor did the trial judge ask the defense counsel or the prosecutor as to their impression of the jury's condition. In short, there is nothing on the record to distinguish the physical condition of this jury from the condition of any other jury that has heard nine days of testimony and deliberated for fifteen hours.[13] Even the

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(Footnote continued from preceding page)

work that they could go on for hours, but these are responsibilities that I feel that the Court has to weigh. What I am suggesting here is what I feel is necessary in the interest of a just and fair determination."

[12] See page 5. At the hearing on appellant's motion to dismiss the indictments, the judge also made the following statement:

"Now, on the previous occasions that day when the jury emerged from their room the Court had observed what was happening, what had started out to be an alert, neatly dressed and a neatly appearing jury. The men's ties were off and all the parties appeared to be discheveled in appearance. I asked the forelady if the jury had arrived at a unanimous verdict and she exhaustedly said, 'not yet.' I described to the jury my observations of it wearily entering the jurybox and my concern lest their evident condition lead to an unjust verdict." Appellee's Appendix, 20.

[13] Fifteen hours is not an unusually long time for a jury to deliberate. In *DeGrandis* v. *Fay*, 335 F. 2d 173 (2d Cir. 1964), the court held that it was not a violation of due process for a trial judge to have kept the jury in deliberation for twenty-four *consecutive* hours (i.e., without sleep) during which time the jury twice advised the court of its fatigue.

prosecutor—quite candidly and properly—admitted before us at oral argument that he was surprised at the trial judge's action.

The Sixth Circuit in *United States* v. *Lansdown*, 460 F. 2d 164, 169 (6th Cir. 1972) held that:

> "The conclusion that a jury is unable to reach a verdict must be supported by something in addition to the trial court's conclusion that the jury has deliberated long enough. (footnote omitted)."

We think a similar rule should be applied as to the jury's physical condition.

Not only was there no inquiry as to the physical condition of the jurors, there was no questioning them as to their progress towards reaching a verdict. Before the defendant loses his Fifth Amendment right, we think that the trial judge must at least determine whether the jury is approaching a verdict. *United States* v. *Lansdown*, *supra*.[14] The only indications present at that time were the jury's responde "not yet" to the judge's question as to whether a verdict had been reached and the requests by the jury for certain crucial portions of the testimony. The response "not yet" is perfectly consistent with a jury actively deliberating, *People ex rel. Stabile* v. *Warden City Prison*, 202 N. Y. 138 (Ct. App. 1911); and the

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[14] The state contends that the trial judge adhered to the procedures suggested by the New Jersey Supreme Court in inquiring into the possibility that a verdict could be reached. See *State* v. *Hutchins*, 202 A. 2d 678, 685, 43 N. J. 85, 96 (1964). While the trial judge did ask the jury whether a verdict might be reached during the first day of deliberations, see pg. 5 *supra*, the record shows that he made no such inquiry on the following day.

testimony which the jury requested demonstrated that they were focusing on a crucial issue in the case. To reiterate, the jury never stated anything to indicate that it was exhausted or deadlocked, and the trial judge had previously told the jurors that they could have all the time they needed. See pg. 5, *supra*.

The manner in which the decision in this case was reached could easily lead to manipulation.[15] As the court said in *Green* v. *United States*, 355 U. S. 184, 188 (1957):

> "This [jeopardy attaching after the jury is sworn] prevents a prosecutor *or judge* from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." (Emphasis added).

The jury was dismissed at 2:25 p.m., and the jurors could have been permitted to remain until the end of the day with little additional hardship. The trial was almost at an end, so the state was not saving any resources as a result of the judge's declaration as it did in *Somerville*.

If "manifest necessity" is to mean anything as a standard, we must find that none existed in this case. A defendant has a valued right to a particular tribunal, and it was taken away from him here.

Much of what the court in *United States* v. *Lansdown*, *supra* at 169, stated is applicable:

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[15] We cannot emphasize too strongly that there is nothing to lead us to suspect that the trial judge was guilty of such manipulation. But the possibility exists and is a factor which we definitely must consider. The alternatives are to allow the discretion of the trial judge to go unchecked or to become embroiled in embarrassing inquiries into his motives in each particular case.

Appendix A

> "We conclude that there was no 'manifest necessity' in this case for declaring a mistrial when the district court did so. The district court, without considering any other factors, simply concluded that approximately 11 hours of deliberation, in a case presenting a close question of credibility, was long enough. The district judge did not seek the opinion of counsel or the defendant; after having told the jury that it could be 'liesurely in its deliberations,' he made no inquiry as to whether the jury was about to reach a verdict or thought that a verdict was possible. Indeed, he rejected statements from the jury that it was on the verge of a verdict and wished to continue. The jury was dismissed at approximately 1:00 P.M. The jurors would have suffered little additional hardship if required to remain at least until the end of the day. Under these circumstances, we believe that the district court failed to protect adequately the defendant's right to have his case decided by a particular tribunal." (footnotes omitted).

When he denied appellant's motion for dismissal of the indictments against him, the trial judge indicated that he was "in effect" agreeing with appellant's motion for a mistrial made on the previous day. But as the record shows, appellant's motion was made on the basis that the jury was deadlocked while the trial judge declared a mistrial on the grounds that the jury was exhausted. Appellant could very well have concluded from the jury's request for the critical testimony that there was a strong possibility of a verdict. Appellant's assessment of his chances with this jury could easily have changed after his request for a mistrial. We see no reason to lock him into a motion once it is made.

Appendix A

In addition, the trial judge stated at the hearing that appellant's counsel did not object while the jury was in the box and that he only objected as an "afterthought." Appellees Appendix, pg. 21. While the better practice may be to object as soon as counsel learns that a mistrial is to be granted, see *Scott* v. *United States*, 202 F. 2d 354 (D. C. Cir. 1952), *cert. denied* 344 U. S. 879 (1952), appellant's counsel was in a difficult situation. He had no advance warning or notice that a mistrial was to be declared; as we mentioned, even the prosecutor admitted that he was surprised by the trial judge's action. The Supreme Court's conclusion in *United States* v. *Jorn*, *supra* at 487, may also be applicable in this situation:

> ". . . [I]ndeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no oppostunity to do so."

Also, to have objected in front of the jury might have prejudiced appellant for trying to "show up" the trial judge, especially if some members of the jury actually did want to go home despite their civic obligation. In this situation, we cannot penalize appellant for failing to object sooner.

If we were presented with a close case, we would have the admonishment of the Supreme Court to resolve doubts about the propriety of a mistrial in favor of the liberty of a citizen. *Downum* v. *United States*, supra at 738. But this is not a close case. We can find no compelling reason to force appellant through still another trial after he was deprived of a jury in the midst of its deliberation.

Appendix A

In this instance the state's interest in enforcing its laws must yield to the right of its citizen not to be reprosecuted.

Since we have disposed of this case on appellant's double jeopardy claim, we do not find it necessary to reach his second contention. We repeat what we said in footnote 15, however, that there is nothing to indicate to us that the trial judge behaved with any impropriety.[16]

The judgment of the district court will be reversed, and the case remanded to that court for it to grant appellant's petition for a Writ of Habeas Corpus.

To THE CLERK:

Please file the foregoing opinion.

JAMES HUNTER, III,
Circuit Judge

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[16] Although it should be obvious, we feel that we should add that the construction of the jury room in question here can only lead to similar difficulties occurring in the future. A jury's deliberations are normally considered secret, and the fact that it is possible to hear conversations which take place inside that room opens up possibilities of overt interference with deliberations of the jury as well as claims such as appellant makes here. It may also inhibit jurors in their discussion to realize that certain portions of their conversations may be overheard.

We commend to the attention of the appropriate governmental authorities the new standard work "The American Courthouse" published by Edwards Brothers, Ann Arbor, Michigan. At Page 56, the text reads: "For security reasons, windows should not permit public exposure, especially at ground level, and the room should be soundproof." The confidentiality of a jury's deliberation and its necessary comfort during this critical time are far too important to be jeopardized by cost cuting construction practices which ultimately develop to be counterproductive.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-2154

UNITED STATES *ex rel.* JOSEPH RUSSO,

Appellant,

vs.

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY, PASSAIC COUNTY COURT, LAW DIVISION, and JOSEPH D. J. GOURLEY, Passaic County Prosecutor,

(D. C. Civil Action No. 1304-72)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ——— DISTRICT OF NEW JERSEY

Present:

HUNTER and WEIS, Circuit Judges and NEWCOMER, District Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ——— District of New Jersey and was argued by counsel.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 11, 1972, be, and the same is hereby reversed, and the cause remanded to the said District Court for it to grant appellant's petition for Writ of Habeas Corpus, in accordance with the opinion of this Court. Costs taxed against appellees.

ATTEST:

THOMAS P. QUINN
Clerk

July 24, 1973

APPENDIX C

Decision of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES *ex rel.* JOSEPH RUSSO,

Petitioner,

vs.

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY, PASSAIC COUNTY COURT, LAW DIVISION, and JOSEPH D. J. GOURLEY, PASSAIC COUNTY PROSECUTOR,

Respondents.

Civil No. 1304-72

Trenton, New Jersey
Wednesday, September 6, 1972

Before:

The Honorable CLARKSON S. FISHER, U.S.D.J.

Appearances: (Not Present)

CUMMINS, CUMMINS, DUNN, HOROWITZ
ROSNER & PASHMAN,
By: DONALD HOROWITZ,
For the Petitioner.

Appendix C

JOSEPH D. J. GOURLEY,
Passaic County Prosecutor,
For the Respondents.

The Court: This is an application for a writ of habeas corpus. Petitioner has been tried twice for murder, and the State of New Jersey now proposes to retry him. The basis for petitioner's application he alleges is double jeopardy, which he claims resulted from the actions of the trial judge in dismissing the jury sua sponte after some seventeen hours of deliberation.

A recitation of what occurred following the jury's retirement from deliberation is necessary. Russo was charged in Indictments Nos. 1031-71 and 1032-71 with the murders of Charles Sheppard and Shirley Green on or about January 1, 1971, at a New Year's Eve party at his home.

Following a somewhat lengthy trial, the jury was charged and commenced deliberating at 10:35 A.M. on December 17, 1971. After deliberating for five or six hours, the judge indicated that he intended to recall the jury and tell them to make a real effort at arriving at a verdict. Russo's counsel objected.

At 7:05 P.M. on December 17, 1971, the jury was recalled, and the Court delivered the so-called Allen Charge, sometimes referred to as the "Dynamite Charge." Again, this was objected to.

At 8:20 P.M. on the same day the jury was recalled and he advised them that he was going to send the jury back and recall them again in a few minutes to inquire whether they had arrived at an unanimous verdict. He

further told the jury that if they had not reached the unanimous verdict, he would make a determination as to whether they would continue to stay at the courthouse or retire to a motel for the evening. Again Russo's lawyer objected.

Again recalled at 8:45 P.M., the judge asked the forelady whether, if the jury was to stay a short time, would there be a reasonable possibility at arriving at an unanimous verdict. She replied: "Yes, your Honor. We need a little bit more time." The jury was advised they would have all the time they needed.

At 9:50 P.M., the jury sent the Court a note stating in substance that they were far from decision at that time. The judge then made arrangements to provide sleeping quarters for the jury for the evening.

The next morning, December 18, 1971, the jury was again sent out to deliberate at 9:28 A.M. At 9:35 A.M. the jury requested a reading of some testimony. After again retiring to consider a verdict, the jury was fed lunch; and at 2:25 P.M., the Court brought the jury back into the courtroom and inquired of the forelady as follows: "Has the jury arrived at an unanimous verdict?" The forelady replied: "Not yet, your Honor." The Court then declared a mistrial in the following manner:

"The Court: Well, last night there was a question in the Court's mind after reviewing with counsel as to whether or not because of the long time that you spent here, whether it would be fair to let the jury continue to deliberate. I felt I wanted to have a full opportunity for you to review and to deliberate and, therefore, I arranged for you to have the unpleasantness of going to a motel, which you did, and since then you have had

breakfast, you deliberated, you have had lunch, and I noticed as you walked out you seemed to be walking out so very wearily and I appreciate very much all that you have done and I am satisfied that it would not be fair to the defendant, nor to the State if in your weariness you arrived at unanimity just for the sake of entering a verdict. I feel that this requires you to be alert and that the time has passed when there is a risk that your verdict would not really represent what you actually feel would be just.

"So that under the circumstances I am going to declare a mistrial and I won't impose upon you any longer than I have. I have imposed upon you because I felt that I had to because of the seriousness of the charge against the defendant that he was entitled to have judged by you and, under the circumstances, I am going to excuse you.

"May I say this to you: I know this has been a tremendous sacrifice to you. I know you have worked hard at trying to arrive at a verdict. It has been a difficult problem for you, I am sure. I know you have undertaken a sacrifice. You have been away from your family and we are approaching a holiday season that you are concerned about preparing for and it's been something which makes me feel very thankful to know that there are people in the country who are prepared to make the sacrifice which you have and I want to thank you very much for all that you have done and you will now be relieved of this responsibility in an area that I feel you have not been able to make a true and an honest judgment which would be unanimous.

Appendix C

"Under the circumstances then, I want to wish you a Merry Christmas and a Happy New Year and I hope that your experience here has been rewarding. You probably now for the rest of your life will be able to understand what other juries have to go through in facing serious decisions that you have.

"Thank you very much."

Petitioner's counsel did not object until the jury had retired to gather its belongings and leave the courthouse, although interestingly enough and significantly enough, Russo's attorney had moved for a mistrial the previous evening before the jury was sent to a motel.

Subsequently, petitioner moved for dismissal of the indictments, which was denied on May 1, 1972. The transcript reveals that at the oral argument Judge Schwartz indicated his reason for declaring a mistrial was that the jury was obviously fatigued and that he was satisfied, taking all things into consideration, that a judgment of guilty from that point on would have been the result of coercion.

Following the denial of the motion to dismiss, an interlocutory appeal was taken to the New Jersey Superior Court, Appellate Division, which was denied, and thereafter the New Jersey Supreme Court declined to certify the matter.

In this status of the case I am satisfied that the petitioner has exhausted his State remedies within the meaning of Title 28 Section 2254(b) and (c) USC. As counsel points out, the Exhaustion Doctrine requires no more than the state courts be given the initial opportunity to rule on the particular issue presented. It is not

an impediment to this proceeding that the New Jersey courts did not deal with the merits of the case. Petitioner's only recourse is here in view of the fact that he is faced with an immediate retrial of the indictments referred to.

As heretofore indicated, petitioner claims that he is being put to double jeopardy, citing the United States v. Lansdown —— F. 2d —— and United States v. Ball, 163 U.S. 662, 669 (1896).

The decision here hinges solely upon the actions of Judge Schwartz in declaring a mistrial after some seventeen hours when neither side had at that stage moved for a mistrial, although, as indicated before, petitioner had moved for a mistrial the previous evening.

It must be borne in mind that the double jeopardy provision of the Fifth Amendment of the United States Constitution does not mean that every time a defendant goes to trial that he is immune from prosecution if that trial aborts.

Long ago in United States v. Perez, 22 U.S. (9 Wheaton) 579 (1824), Mr. Justice Story set forth how the actions of a trial judge in this posture of the case should be reviewed.

> "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is im-

> possible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with great caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office."

In my view Judge Schwartz acted properly in exercising his discretion to conclude the trial at the point he did. The record indicates that the Court was moved to do what he did by the obvious exhaustion of the jury and his fear that an unjust result would occur if the jury was allowed to continue its deliberation.

I recognize that the petitioner is about to face a third ordeal by trial, but there are times when a defendant's right to have his trial completed by a particular tribunal was to be subordinated to the public interest in having fair trials result in proper judgments. See Wade v. Hunter, 336 U.S. 684 (1949).

Petitioner further moves this Court to hold an evidentiary hearing based upon his contention that oral argument in this cause, that the courthouse rumor was that the jury could be overheard, and that voting in the jury at that time favored the petitioner. This I refuse to do because I consider it unseemly and highly improper to probe into the inner processes of a deliberating jury.

Appendix C

Accordingly, the application for a writ of habeas corpus is hereby denied. However, since the question is close, I hereby certify that probable cause does exist for appeal.

APPENDIX D

Final Order and Certificate of Probable Cause of the United States District Court for the District of New Jersey

(Filed—October 11, 1972)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES *ex rel.* JOSEPH RUSSO,

Petitioner,

vs.

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY, PASSAIC COUNTY COURT, LAW DIVISION, and JOSEPH D. J. GOURLEY, PASSAIC COUNTY PROSECUTOR,

Respondents.

Civil No. 1304-72

This matter being opened to the Court by Cummins, Cummins, Dunn, Horowitz, Rosner & Pashman, Esqs. (Donald Horowitz, Esq., appearing), in the presence of Joseph D. J. Gourley, Passaic County Prosecutor, upon the Verified Petition For Writ Of Habeas Corpus and other relief requested therein, and the Court having heard and considered the arguments of counsel and the material filed;

Appendix D

It is on this 10th day of October, 1972, for the reasons stated in the oral decision rendered by this Court on September 6, 1972.

Ordered that the application for a Writ of Habeas Corpus be and hereby is denied; and

Certified that probable cause for appeal does exist.

Clarkson S. Fisher, U.S.D.J.
Clarkson S. Fisher

I hereby consent as to
the form of the within
Order.

Joseph D. J. Gourley
Joseph D. J. Gourley
Passaic County Prosecutor

Angelo W. Locascio, Clerk

SUPREME COURT, U. S.

FILED

SEP 19 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-332

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY, PASSAIC COUNTY COURT, LAW DIVISION, and JOSEPH D. J. GOURLEY, Passaic County Prosecutor,

Petitioners,

vs.

UNITED STATES OF AMERICA *ex rel.* JOSEPH RUSSO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Donald Horowitz
Attorney for Respondent
39 Hudson Street
Hackensack, New Jersey

LEGAL MIMEOGRAPHING SERVICE, INC.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 73 – 332

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY, PASSAIC COUNTY COURT, LAW DIVISION, and JOSEPH D. J. GOURLEY, Passaic County Prosecutor,

Petitioners,

vs.

UNITED STATES OF AMERICA *ex rel.* JOSEPH RUSSO,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Donald Horowitz
Attorney for Respondent
39 Hudson Street
Hackensack, New Jersey

Statement of the Case

Respondent has been charged, in Indictments No. 1031–71 and 1032–71, with the murder of Charles Sheppard and Shirley Green, on or about January 1, 1971, at a New Year's Eve party at his home. The respondent has now stood trial twice before a jury in the Passaic County Court, with the Honorable Louis Schwartz, J.D.C. (t/a) presiding both times. The first trial took approximately three weeks. Approximately forty witnesses testified, commencing on December 3, 1971. On December 18, 1971, the trial court *sua sponte*, without consultation with or consent of the respondent, discharged the jury during the course of their deliberations.

On Thursday evening, December 16, 1971, after the summations of counsel, the Court instructed the jurors to bring their night clothes with them the following morning. On Friday morning, December 17, 1971, the Court charged the jury and thereafter the jury commenced deliberating at 10:35 A.M. After five or six hours of deliberation, the trial court indicated that it intended to recall the jury and ask them to make an effort to apply themselves to the task at hand and to deliberate further for the purpose of bringing out a verdict. Respondent objected to any further instruction at that time urging that it was not unusual for a jury to deliberate five or six hours after a lengthy trial in a capital case. (Appendix to Petitioner–Appellant Russo's Brief filed in the Court of Appeals hereinafter referred to as Brief Appendix,5a 1 to 6a 8)

At 7:05 P.M. on December 17, 1971, the Court recalled the jury and gave them the Allen Charge, sometimes called the"Dynamite Charge". The respondent of course objected to the charge. At 8:20 P.M., the Court again recalled the jury and informed them that he was going to send them back to the jury room and in a few minutes recall them once more to inquire whether they had arrived at a unanimous verdict. The Court further advised the jury that in the event they had not then reached a unanimous verdict, the Court would have to take the responsibility of making a determination as to whether the jury would continue to stay in the Court

House or whether arrangements would be made for them to retire to a motel for the evening. The respondent again objected that inasmuch as it was only 8:30 P.M. the Court was putting undue pressure on the jury at that point to arrive at a verdict. (Brief Appendix 8A 25 to 13A 17)

At 8:45 P.M., the jury was again recalled to the Courtroom. The Court at this time asked the Forelady whether she believed that if the jury was to stay for a short time at the Courthouse there was a reasonable possibility of arriving at a unanimous verdict. The Forelady responded, "Yes, Your Honor. We need a little bit more time." The trial court then advised the jury that they could have all the time they needed, as follows:

> "A little bit more time. Well, the Court will be very happy to make that available for you, but *you must understand that you can have all the time that you need whether it is tonight or whether it would be tomorrow. Time is no problem.* Those of us who are employed by the County are prepared, as a part of our responsibility, to give the full time to a jury and you folks should understand that you have the full time in order to arrive honestly, without sympathy, without prejudice, without fear, just having in mind what is a just result..." (Emphasis added) (Brief Appendix 4a 6 to 25)

At 9:50 P.M., the jury sent the Court a note stating:

> "Your Honor, we are far from the decision at this time."

The Court then indicated that it would have the jury transported to a motel and that the Court would stand adjourned until the following morning at 9:00 A.M. The respondent moved for a mistrial, the State objected thereto, and the Court in effect denied the motion. (Brief Appendix, 15a 19 to 16a 20)

At 9:55 P.M., the jurors returned to the Courtroom. The trial court addressed the jurors as follows:

"...please remember now that once you leave the jury room and until tomorrow morning you are not to talk to anyone about the matter. I am going to ask you to reserve reviewing the case because you are going to be with Court officers who are not members of the jury so don't talk about the case at all and tomorrow morning we will resume our deliberations. *At that time you will have ample time to engage in further deliberation...*" (Emphasis added)

Thereafter the jurors were transported to a motel for the night. (Brief Appendix, 17a 1 to 18a 3)

The next morning, Saturday, December 18,1971, after the jury entered the Courtroom, the Court addressed the jury as follows:

"Good morning, ladies and gentlemen. I hope that you have had a good night's rest so that *today you can continue with calmness to deliberate,* and so that *without any thought of being hurried* you might review the nature of the discussion that you had up to date..."
(Emphasis added) (Brief Appendix 20a 4–9)

Thereafter, at 9:28 A.M. the jury retired to the jury room for further deliberation. (Brief Appendix 20a 23)

At about 9:35 A.M., a scant seven minutes later, the Court received a note from the jury requesting to hear certain testimony, which was quite extensive. This was the first time during their deliberations that the jury had requested the reading of testimony. It was apparent to all that their deliberations were intensified and active and that the nature of their requests were most significant. (Brief Appendix 21a 6–25)

The State's principal witness was Kenneth Timmerman, who testified that the respondent had shot the deceased. But William Gutowski, a former employee of Timmerman, testified that he was present at the scene of the crime and saw Timmerman fire the shots that killed the deceased. The issue of credibility, therefore,

was of utmost importance. The victims of the crime were Charles Sheppard and Shirley Green. Timmerman had testified that he observed respondent fire several shots at Sheppard from a distance of one foot. Gutowtestified that Timmerman had fired at Sheppard and that he was at a distance of seven or eight feet when he fired the shots. (Brief Appendix 57a, 58a)

Special Agent Courtlandt Cunningham, of the Federal Bureau of Investigation, testified, for the State, that he could find no powder residue on the clothing and body of both Sheppard and Green. Cunningham further testified that if the victims were shot at a distance of less than six feet, powder residue would be found on their clothing and bodies, that six to eight feet is the maximum distance for the existence of powder residue, and that certainly there would be an evident quantity of powder residue if the shots were fired at a distance of one to two feet. (Brief Appendix 58a)

Among the several inquiries made by the jury on the morning of December 18, 1971, of moment was the following:

(a) " Timmerman's testimony as to distance of gun from Sheppard and Shirley. "

(b) "Billy Gutkowski's testimony as to distance."

(c) " F.B.I. report as to powder burns and powder residue."

It was apparent that the foregoing inquiries and the answers therto to be supplied to the jury were most favorable to the respondent and indicated that the jury was seriously considering the defense's version. If the jury accepted the testimony of Special Agent Cunningham of the F.B.I., the jury undoubtedly would find that the State's witness, Timmerman, lied on a material issue, and the credibility of the defense witness, Gutowski, was considerably enhanced. The jury's request was not immediately complied with, however. After the jury submitted its inquiry at about 9:35 A.M., practically the balance of the morning was taken up with researching the record and consultation with counsel and the Court in order to determine exactly where in the

transcript the certain portions of the testimony requested by the jury was contained. There was also additional delay in order to permit one of the Court Reporters who was not present that morning, but was on call, to arrive at the Court House with his notes. As a result, it wasn't until 11:26 A.M. that the jury was recalled and their inquiries, in the main, answered. Then at 11:50 A.M, the jury retired to deliberate. (Brief Appendix, 22a 1 to 40a 20)

At 11:58 A.M., the jury was again recalled for clarification of certain instructions which had just been read to them. At 12:00 noon, the jury again retired. Then, at 12:08 P.M., the jury was again recalled to the Courtroom, and Special Agent Cunningham's testimony relative to the powder burns was read to them. The jury again retired for deliberation at 12:15 P.M. Thereafter, lunch was served to the jury in the jury room. (Brief Appendix 41a 20 to 47a 23)

Thereafter, the respondent and his counsel, while waiting to be served their lunch at a nearby restaurant, were summoned by a Court attendant to immediately return to the Court House. Neither the respondent nor his counsel was advised of the reason therefore. (Brief Appendix 60a) At 2:25 P.M., the trial court, without advice or consultation with the respondent, had the jury returned to the Courtroom and inquired of the Forelady:

"Has the jury arrived at a unanimous verdict?"

The Forelady replied:

"Not yet, Your Honor." (Brief Appendix 48a 8–10)

The trial court thereupon, without consultation with or the consent of the respondent, declared a mistrial and excused the jury. Respondent was quite naturally taken by surprise by what had transpired. Prior thereto, in in every instance when the jury was to be the subject of an inquiry or to be given any instructions, the trial court had scrupulously and invariably consulted with the re-

spondent. Strangely, at this crucial time, the Court *sua sponte* declared a mistrial without consulting the respondent or giving him an opportunity to object thereto. (48a 11 to 49a 11)

It was clear that the jury was not deadlocked. They had just received extensive instructions and had been read testimony focusing on issues damaging to the State's case. They had relatively little opportunity for deliberation before they were recalled and the mistrial declared. It was evident that the jury's inquiries and the answers given in response thereto tended to favor the respondent's position, and that the jury was inclining toward an acquittal. Under the circumstances, the declaration of a mistrial effectively deprived the respondent of a verdict of acquittal.

Prior to the declaration of a mistrial, it had been the common knowledge of those in the Court House and close to the case that the jury was leaning strongly in the direction of acquittal and that the vote stood eight to four in favor of the respondent. This fact was admitted publicly by the Prosecutor, whose statement to this effect appeared in the newspaper on the day following the hearing in the District Court. The walls of the new Passaic County Court House, where the case was tried and where the jury deliberated are far from soundproof, and this fact could have resulted in the accidental disclosure of the actual deliberations of the jury to the court attendants and ultimately to others close to the case. It is possible that the attitude of the jury in favor of acquittal could have eventually been communicated to the trial judge, whose response was to declare a mistrial citing the "weariness" of the jury as his reason.

Reason for Denying the Writ

In finding there was no manifest necessity for the declaration of the mistrial, the Court of Appeals clearly recognized, articulated and applied the abuse of discretion principle of appellate review formulated by Justice Story in *United States v Perez*, 9 Wheat. (22 U.S.) 579, 580 (1824) (Petitioner's Appendix A, 102–112). The Court of Appeals further recognized the recent admonition of this Court in *Illinois v. Somerville*, ____ U.S. ____, 93 S. Ct. ____ 35 L. Ed. 2d 425 (1973), that each case must necessarily turn on its particular facts (Petitioner's Appendix A, 11). Applying these proper principles to the facts of this case, the Court of Appeals found that the trial judge clearly abused his discretion, that this is not a close case, and there is no reason to force respondent through still another (third) trial after he was deprived of a jury in the midst of it's deliberations. There is no justification nor purpose to be served by further review by this Court.

The Fifth Amendment prohibition against placing a defendant "twice in jeopardy" is intended to protect an individual from being subjected to the hazards of more than one trial for the same offense. In *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221 (1957), this Court set forth the rationale behind the double jeopardy clause:

> "The underlying idea, one that is deeply ingrained in at least the Anglo–American System of Jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. *Green v. United States*, *supra.*, 187–188.

Moreover, this Court has maintained that the fact that the first trial did not result in a verdict of guilt or innocence by the jury does not prevent the defendent from offering the first trial as a bar to a second trial on the same charge. *Green v. United States, supra.*; *Dounum v. United States,* 372 U.S. 734, 83 S. Ct. 1033 (1963)

Yet it is evident that a criminal trial is a relatively complex proceeding, dependent upon a host of unpredictable considerations such as the health of the jurors or the partipicants, and the tactics employed by either side. This Court has recognized that

> "A mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide." *United States v. Jorn,* 400 U.S. 470, 480, 91 S. Ct. 547 (1971)

For this reason, the Federal Courts have long adhered to the relatively flexible doctrine of "manifest necessity" in characterizing those situations where a trial may be aborted prior to a final jury verdict without the double jeopardy clause arising as a bar to another trial of the defendant. This doctrine of "manifest necessity" was first articulated by Mr. Justice Story in *United States v. Perez, supra,* and recently reiterated in *United States v. Jorn, supra.* This Court in *Jorn* held that a trial judge abused his discretion by discharging the jury because of his fear that five taxpayers involved in the litigation had not been adequately warned of their constitutional rights, thereby adding *Jorn* to the recent line of cases narrowing the discretion of a trial judge to declare a mistrial without the double jeopardy clause closing the door to further proceedings. See also *Downum v. United States, supra.*; *United States v. Lansdown,* 469 F. 2nd 164 (4th Cir., 1972).

Mr. Justice Harlan, writing for the Court in *Jorn*, set forth very strict standards for judicial discretion before

a mistrial can be declared without a motion on the part of the defendant. Absent such a motion,

> "The *Perez* doctrine of manifest necessity stands as a command to judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v. Jorn, supra.*, 485.

Recently, the Fourth Circuit Court of Appeals handed down a decision in a case almost identical to the present one. *United States v. Lansdown, supra.*, was a criminal case in which the trial judge acting entirely on his own and without conferring with counsel for either side declared a mistrial and discharged the jury after they had failed to reach a verdict. *Lansdown*, like the present case, presented very close and difficult questions of fact for the jury to decide. In *Lansdown*, as in this case, the judge gave the Allen charge, or "dynamite charge", to the jury after they had deliberated for several hours, at the same time advising the jury that they could take all the time they felt necessary to reach a decision. In fact, the jury in *Lansdown* had actually informed the judge that they were unable to agree upon a verdict prior to his administering the Allen charge, something which the jury never even suggested in the present case. And in the middle of the second day of deliberations by the jury in *Lansdown*, the judge *sua sponte* declared a mistrial without consulting either side, just as in the present case.

The Fourth Circuit found that there was no "manifest necessity" in *Lansdown* for declaring a mistrial when the trial judge did so, citing the failure of the judge to seek the opinion of either side and his failure to inquire as to whether the jury was about to reach a verdict or thought a verdict was possible despite his previous statements that the jury could be "leisurely in its deliberations." In its opinion in *Lansdown*, the Court was careful to point out that the decision to declare a mistrial in cases of apparent inability to agree should not be based solely on the length of time that the jury has

deliberated, stressing the importance of inquiring of the jury itself, and citing numerous cases where mistrials had been upheld after varying periods of deliberation only because in each the jury had expressly stated that they were hopelessly deadlocked. This position is further supported by the decision of the Supreme Court in *Logan v. United States*, 144 U.S. 263, 36 S. Ct. 429 (1892) where "manifest necessity" for a mistrial was found to exist after the jury had deliberated for forty hours but only after they had announced at that point that they were unable to agree.

By contrast, in the present case, the jury actually gave a number of clear indications that their deliberations were progressing and that a verdict would be forthcoming, indications that were not even present in the *Lansdown* case. On the morning of the second day of their deliberations, the jury requested to have elements of the testimony of key witnesses of the trial read to them, as set forth in the Statement of the Case, *supra*, which took most of the morning to accomplish. These requests indicated that the jury's deliberations were active and focused directly on the key question in the case. Yet only two hours after the requests of the jury were finally satisfied, and during which time they had paused for lunch, the trial judge, acting solely on his own, took the case out of their hands.

It is also significant to note that when the judge immediately prior to declaring a mistrial inquired as to whether the jury had as yet arrived at a unanimous verdict, the forelady replied,

"Not yet, Your Honor".

It is clear that the response "not yet" is not a declaration of a deadlock. This conclusion is strongly supported by *People, ex. rel.* Stabile v. *Warden of City Prison*, 202 N.Y. 138 (Ct. App. 1911), a case similar to the present one in which the defendant sought to bar a second trial on the grounds of double jeopardy, alleging that the trial judge abused his discretion in discharging the jury. In deciding for the defendant, the New York Court of Appeals concluded that the re-

sponse "Not as yet" clearly indicated that the jurymen had not completed their discussion and deliberation in an effort to reach a verdict, and that they were in the midst of such discussion and deliberation, and that they required further time before they could determine whether they were able to agree upon a verdict. The Court in *Stabile* stated that

> "The reply included by implication a hope and perhaps even an expectation of an agreement." See also *State ex. rel. Schlesenger v. Glick*, 325 N.Y.S. 2d. 869 (Sup. Ct. 1971).

It seems apparent, then, that based on the strict standard of "scrupulous exercise of judicial discretion" established by the Supreme Court in *Jorn*, along with the failure of the trial judge in this case to inquire into the progress of the deliberations as in *Lansdoun* and the failure of the jury to announce on its own initiative that it was hopelessly deadlocked as in *Logan*, but rather offered clear indications to the contrary, that there was no "manifest necessity" for the judge in the present case to declare a mistrial on the grounds that the jury was unable to agree on a verdict. However, statements made by the trial judge in discharging the jury in this case could be seized upon in an attempt to argue that "manifest necessity" for declaring a mistrial did exist. This feature of the case, which slightly distinguishes this case from the situation in *Lansdown*, must be met head on.

The trial judge in the present case made the following remarks to the jury upon discharging them, remarks which reflect at least part of his basis for his *sua sponte* declaring a mistrial:

> "I felt I wanted to have a full opportunity for you to review and to deliberate and, therefore, I arranged for you to have the unpleasantness of going to a motel which you did, and since then you have had breakfast, you deliberated, you have had lunch, and I noticed as you walked out you seem to be walking out so very wearily and I appreciate very much all that you have done

and I am satisfied that it would not be fair to the defendant, nor to the State if in your weariness you arrived at unanimity just for the sake of entering a verdict. I feel that this requires you to be alert and that the time has passed when there is a risk that your verdict would not really represent what you actually feel would be just." (Brief Appendix 48a 15 to 49a 4)

With good reason appellate courts are generally reluctant to overrule a lower court judge whose exercise of his discretion must be based on a subjective judgment of the specific situation before him. Yet it cannot be argued in the present case that the trial judge, who based his decision on a subjective evaluation of the "weariness" of the jurors would affect their judgment or whether the jurors were deadlocked, as the Court said in *Lansdown*,

> "The most reliable source as to this information is the jury itself."

Yet neither in respect to whether the jurors were deadlocked nor in respect to whether they were "weary" and whether such "weariness" might affect their judgment did the trial judge ever make an inquiry of the jurors themselves. Nor did the trial judge at any time ever confer with counsel for either the defendant or the prosecution or seek any other outside opinion to help measure whether his subjective evaluation of the capabilities of the jurors at the time that the mistrial was declared was apparent to others or whether he could possibly have been mistaken. All he had were a few hints or possible suggestions from having the jurors in his presence for several short periods of time that morning in the face of clear indications that they were actively and energetically working toward a verdict. [1]

[1] The District Court assumed that the trial court was moved to declare a mistrial "by the obvious exhaustion of the jury". *United States ex rel. Joseph Russo v. Superior Court of New Jersey*, Civil No. 1304-72, 9 (D.N.J. September y, 1972). (112a) Yet, the record offers not even the slightest indication of exhaustion on the part of any member of the jury.

And even if it is assumed for a moment that the trial judge's evaluation was generally accurate, there clearly can be little basis for an argument that "weariness" on the part of the jurors created "manifest necessity" for a declaration of a mistrial. Those cases in which a finding of "manifest necessity" has been sustained give a clear indication of the circumstances justifying termination of the trial and subsequent reprosecution. The Court in *Olke v. United States*, 389F 2d. 668 (9th Cir. 1968), cert. denied *Graves v. United States*, 390 U.S. 1029, 88 S. Ct. 1420 (1968) sets out several situations supported by appropriate citations where double jeopardy is not a bar to a second trial: where the jury is unable to agree; or where a juror swears falsely on *voir dire*; or where a juror or the Court becomes ill or incapacitated. Added to this list are cases where outside influences are brought to bear on the jury: *Simmons v. United States*, 142 U.S. 148, 12 S. Ct. 171 (1891): or cases of tactical needs of the military in time of war: *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834 (1949). All of these cases support the conclusion of Mr. Justice Douglas, who wrote the Opinion in *Downum* and who stood with the majority in *Jorn*, that "manifest necessity" requires a relatively objective "breakdown in jurdiial machinery". *Gori v. United States, supra.*, 372 (Douglas, J. dissenting).

Clearly, on the basis of the cases enumerated above, and on the basis of those recent cases where a finding of "manifest necessity" was not sustained, that is, *Downum*, *Jorn*, and *Lansdown*, any apparent "weariness" on the part of the jurors in the present case cannot be argued to constitute "manifest necessity" for a mistrial and reprosecution of the defendent. Every trial under our system of justice must endure the human qualities of the participants. It is difficult to imagine a trial as long as the present one, let alone a trial lasting for many weeks, in which the jurors would not become "weary". And this fact must be especially true in the case of a murder trial where the jury's task is so serious and their deliberations must be so intense, often consuming many hours. Is it not highly likely that if the present case is tried again the jurors will be just as "weary" near the end of the trial, if not even more so?

Even forgetting for a moment the requirement of "manifest necessity", allowing a trial judge *sua sponte* to declare a mistrial and reprosecution of the case solely on the ground that he felt the jurors were "weary" would create a standard so vague and so subjective as to promote arbitrariness and even abuse. Clearly distinct from cases of illness or exhaustion, of which there is no indication or even suggestion in the present case, it is difficult to imagine any trial of any substantial length in which a judge could not determine the jurors to be "weary" and declare a mistrial.

A defendant in a criminal case has a

> "valued right to have his trial completed by a particular tribunal". *Wade v. Hunter, supra.*, 689.

For this reason the Courts have consistently encouraged a very strict standard in applying the doctrine of "manifest necessity" on those

> "occasions when the citizen can for the same offense be required to run the gauntlet twice". *Gori v. United States, supra.*, 373 (Douglas, J., dissenting).

In the words of Mr. Justice Story, who coined the doctrine of "manifest necessity" in *Perez*, cited in *Downum*;

> "The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances.' *Downum v. United States, supra.*, 736, citing *United States v. Coolidge*, 25 Fed. Cas. 622, 623 (1813).

Those extraordinary and striking circumstances did not exist in the present case and clearly the trial judge

Those extraordinary and striking circumstances did not exist in the present case; and clearly the trial judge abused his discretion in declaring a mistrial.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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